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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

H027045

Plaintiff and Respondent,

(Santa Clara County
Superior Court
No. CC247767)

v.

GABRIEL FREEMAN,

Defendant and Appellant.

_____/

Defendant Gabriel Freeman pleaded no contest to sexual penetration with a foreign object of a person under the age of 18 (Pen. Code, § 289, subd. (h))¹ and admitted two prior serious felonies within the meaning of the Three Strikes Law (§§ 667, subds. (b) – (i), 1170.12). The trial court dismissed one of the prior strike convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The trial court then imposed the upper term of three years, citing the vulnerability of the victim as an aggravating factor, and doubled the sentence under the Three Strikes Law for a total term of six years. On appeal, defendant contends that the trial court violated his right to jury trial as explained in *Blakely v. Washington* (2004) ____ U.S. ____, [124 S.Ct. 2531] (*Blakely*). For the reasons stated below, we affirm.

¹ All further statutory references are to the Penal Code.

I. Statement of Facts²

Seventeen-year-old Jane Doe was mentally disabled and lived in a group home. On January 26, 2002, Jane Doe was returning from Sacramento with her mother, her mother's friend, and defendant. Both Jane Doe and defendant were sitting in the back seat. Jane Doe was half-asleep when defendant touched her under her shirt and pants. He also put his finger inside her vagina. Jane Doe told him to stop, and he eventually did. She did not tell her mother until the following day, because she was afraid.

II. Discussion

Defendant contends that his sentence violates *Blakely*, because the trial court imposed the upper term based on a factual finding that was not admitted by his plea nor found by a jury.³ The People argue that since defendant faced a maximum prison term of 25 years to life by admitting two strike prior convictions, his six-year prison term does not violate *Blakely*.

² The statement of facts is taken from the probation report.

³ The People contend that defendant has forfeited this claim, because he failed to raise it below. We disagree. Courts have held that a defendant need not object to preserve an issue for appeal where to do so would have been futile. (See *People v. Hill* (1998) 17 Cal.4th 800, 820 [prosecutorial misconduct]; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648-649 [judicial misconduct].) The rationale for this exception also applies when statutory or case law that is binding on the trial court would have precluded the claim. (Cf. *People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6 [no waiver of claim where the lower court was bound by case law on the issue].) Here it would have been futile for defendant to request a jury trial or a reasonable doubt standard regarding aggravating circumstances, because California statutory and case law before *Blakely* clearly provided that the trial court was authorized to impose consecutive sentences under specified circumstances. (§§ 1170, subd. (b), 1170.1, subd. (a); *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1769.) In order to do so, the trial court was required to find facts to support its decision under a preponderance standard. (*People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231.) Thus, given the state of the law, defendant was not required to raise this issue before the trial court in order to preserve it for appeal.

In *Apprendi v. New Jersey (Apprendi)* (2000) 530 U.S. 466, the United States Supreme Court held: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Id.* at p. 490.)

In *Blakely*, the court considered the application of the *Apprendi* holding in a case in which the defendant pleaded guilty to second-degree kidnapping involving a firearm and domestic violence. (*Id.* at pp. 2534-2535.) Under Washington law, when the trial court imposes a sentence that departs from the standard range sentence, it must make findings of fact and conclusions of law to support the determination. (*Id.* at p. 2535.) Thus, pursuant to this statutory scheme, the trial court sentenced the defendant to more than three years above the statutory 49 to 53-month maximum after it found that the defendant had acted with “deliberate cruelty.” (*Ibid.*) The court concluded “that the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . . In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without any additional findings*.” (*Id.* at p. 2537.) Thus, the court found the defendant had been denied his right to a jury trial, because the trial court relied on facts not found by the jury or admitted by the defendant. (*Id.* at p. 2538.)

At issue in the instant case is the statutory maximum sentence the trial court could impose without making additional factual findings.

In *People v. Garcia* (1999) 20 Cal.4th 490, 496, the California Supreme Court stated: “[T]he striking or dismissal of a charge of prior conviction . . . is not the equivalent of a determination that defendant did not in fact suffer the conviction [citations]; Such judicial action is taken . . . “for the purpose of sentencing” only and “any dismissal of charges of prior convictions . . . does not wipe out such prior

convictions or prevent them from being considered in connection with later convictions” [citation].’ Thus, we acknowledged that a court might strike a prior conviction allegation in one context, but use it in another.” In addition, after reviewing the history of the jury trial right, the *Apprendi* court stated: “We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion -- taking into consideration various factors relating both to offense and offender -- in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case. . . . [O]ur periodic recognition of judges’ broad discretion in sentencing . . . has been regularly accompanied by the qualification that that discretion was bound by the range of sentencing options prescribed by the legislature. [Citations.]” (*Apprendi, supra*, 530 U.S. at pp. 481-482.)

Where the trial court strikes one of the prior strike convictions, there is no impact on our calculation of the statutory maximum penalty. The trial court may consider additional facts not found by the jury or admitted by the defendant as long as the sentence lies within the range established by the jury’s findings or the defendant’s admissions. (*Apprendi, supra*, 530 U.S. 466, 494. fn. 19.) Here defendant admitted the facts that authorized the trial court to impose a statutory maximum sentence of 25-years-to-life under the Three Strikes Law. Defendant’s six-year sentence did not exceed the statutory maximum, and thus it did not violate *Blakely*.

III. Disposition

The judgment is affirmed.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

McAdams, J.